Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

REPLY COMMENTS OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE

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SUMMARY

The Commission should adopt the Joint Board's proposal to limit high cost subsidization to primary lines, regardless of whether incumbent wireline carriers or wireless carriers provide the secondary lines. The Commission must balance, on the one hand, the goal of promoting competition and, on the other hand, the goal of assuring that the prescribed mechanism for advancing universal service is predictable, sustainable and sufficient. The second goal mandates that the Commission not continue to make high cost subsidies available to incumbent wireline carriers for secondary lines. These carriers, not the wireless service providers, have drawn the overwhelming amount of high cost subsidies from the Universal Service Fund. Reducing high cost subsidies to wireless, but not wireline, providers would ignore the real reasons that the high cost component of the Universal Service Fund has grown so rapidly and now threatens the sustainability of the Fund.

Limiting high cost subsidization to primary lines as a general matter would not violate the requirement that rural consumers pay reasonably comparable rates for secondary lines. Rate-of-return regulated wireline carriers who serve rural areas have presented no data showing that but for continuation of high cost subsidies for secondary lines they could not continue to provide such service at affordable, reasonably comparable rates. Nor have the wireless service providers shown that they would be unable to provide their services without high cost subsidies. Certainly, the public interest would not be served if the availability of high cost funds for secondary lines were an economic prerequisite

to the build-out of wireless networks in rural areas. The Universal Service Fund will not be sustainable if it continues growing without regard to sensible economics and showings of actual need. The Commission can make a bet to the contrary, but it will prove to be wrong.

Nor would limiting high cost subsidies to primary lines be at odds with the principle of competitive neutrality, provided that primary line support is fully portable to eligible telecommunications carriers. The Commission would contravene the principle of competitive neutrality if it adopted mitigation or "make whole" measures that in effect assure revenue flows to wireline carriers but not to wireless providers. Mitigation measures would be defensible only if administered in a competitively neutral manner and supported with actual showings, as distinguished from hyperbolic rhetoric.

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The Ad Hoc Telecommunications Users Committee (hereinafter "Ad Hoc") hereby submits its reply to comments filed on August 6, 2004 in response to the Commission's June 8, 2004 Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

As some of the largest end user payers of universal service charges, Ad Hoc members consistently have supported the Commission's efforts to advance and promote universal service. Just as consistently, Ad Hoc has urged the Commission to properly size and target universal service subsidies. Commenters provide solid and persuasive arguments in support of the Joint Board's proposal to limit high cost support to primary lines but this would be a small step, only a small step, in right-sizing the bloated high cost component of the Universal Service Fund ("USF"). However, neither the commenters nor the Joint Board have gone far enough to limit and possibly reverse growth of the high

[1] *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 04-127 (released June 8, 2004).

cost component of the USF directed to incumbent local exchange carriers ("ILECs").

A. Growth Of High Cost Subsidies Is Attributable Only Relatively In Small Part To Subsidies Received By Wireless Carriers.

Several parties have provided data that show dramatic growth in high cost subsidies. For example, the National Association of State Utility Consumer Advocates ("NASUCA") presented a table showing total high cost support growing from just over $1.72 billion in 1999 to over $3.28 billion in 2003.[2] Verizon adds that, "[e]ven if there were no additional growth, by 2005 the fund [high cost disbursements] would be more than $3.75 billion per year – more than double the size of high cost support from just five years ago."[3] For its part, AT&T notes, among other things, that but for use of, "unexpended funds to offset a portion of the anticipated demand for schools and libraries support," the contribution factor would have been over 10% for the third quarter of 2004.[4] Different slices of the data present different numbers, but the trend is same, regardless of which data are examined. The USF is growing at an unsustainable rate, and the high cost component is driving the growth.

The same data demonstrate that although high cost support to wireless carriers has grown substantially, particularly when expressed as a percentage showing the rate of growth or the percentage of high cost funding received by wireless carriers, wireline carriers have received the overwhelming share of the

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2 NASUCA, Comments at 8. All citations herein to comments of other parties refer to comments filed in the above-captioned proceeding on August 6, 2004.

3 Verizon, Comments at 4.

4 AT&T, Comments at 1 n.9.

growth in high cost subsidies. For example, CTIA points to Universal Service Administrative Company statistics to show that between 2000 and 2003, the high cost support received by CMRS providers increased by about $124.5 million, while the ILEC high cost support grew by $900 million.[5] The Commission should come to grips with fundamental problems with the high cost component of the USF, problems more significant than limiting the availability of high cost subsidies to primary lines. Ad Hoc hopes that that will happen in the anticipated inter-carrier compensation proceeding and/or as a result of the Commission's consideration of appropriate mechanisms to succeed the five-year plan adopted in the *Rural Task Force Order*.[6] Nevertheless, Ad Hoc supports the proposal to limit high cost support to primary lines because such a step is consistent with statutory guidance and a constructive small first step toward returning the universal service mechanism to a sound footing. As shown in comments of other parties and below, the arguments opposing limiting high cost support to primary lines are unpersuasive.

B. Limiting High Cost Support To Primary Lines Would Not Violate The Principle Of Competitive Neutrality.

Some parties seem to have confused the promotion of competition with competitive neutrality, and have failed to appreciate the need to balance the goal of promoting competition with the statutory goal of advancing universal service through "specific, predictable and sufficient Federal and State mechanisms."[7]

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5 CTIA, Comments at 6.

6 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Public Notice, FCC 04J-2 (released August 16, 2004).

7 47 U.S.C. §254(b)(5) (2001).

While Ad Hoc agrees with Western Wireless that, "[t]here is no basis under the Act for the continued protection of rural ILECs to the detriment of rural consumers,"[8] Ad Hoc does not accept Western Wireless' contention that, "[t]he public interest demands that the benefits of providing universal service support to competitive carriers be the determining factor in any reform measures."[9] The United States Court of Appeals for the Fifth Circuit has explained that the pro-competitive goals of the Communications Act of 1934, as amended (the "Act"), co-exist with the Act's universal service mandate. The Commission may not sacrifice either goal. Accordingly, the court concluded that the, "Commission therefore is responsible for making the changes necessary to its universal service program to ensure that it survives in the new world of competition."[10] The Commission is left with a difficult balancing act. Of course, more competition in high cost areas would be desirable; but at what cost and at what risk to universal service? The Commission, as the courts would surely remind the Commission, must also serve the goal of advancing universal service. Limiting high cost support to primary lines would, as a first step along with other reforms, serve both goals.

If high cost support is available only for primary lines, but is portable to CMRS providers and other competitive entrants, the Commission would be faithful to both statutory goals. Ad Hoc cannot agree that competitive neutrality mandates high cost support to multiple lines to the same residence or business.

8 Western Wireless, Comments at 6.
9 *Id*. at 9.
10 *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 615 (5th Cir. 2000).

Competitive neutrality does demand that the available high cost support be available to incumbent carriers and to their competitors on a competitively neutral basis.[11]

NASUCA describes a balloting process that would allow customers with multiple lines to designate their primary line.[12] That line would receive high cost support. Rural wireline carriers should not have a preferential position or status in the balloting process. NASUCA is correct: "Allowing the customer to choose is the ultimate expression of the consumer sovereignty that is supposed to apply in a competitive market."[13]

Continued growth in high cost subsidies would undermine the sustainability of universal service support. Use of collected, but uncommitted, USF monies and more vigorous enforcement will not be enough to keep the USF factor below ten percent. As the economic burden of universal service charges grows heavier under the current assessment methodology, regulatory policy will give consumers even greater incentive to look for alternatives to avoid some, or all, of the universal service burden. The USF is on the edge of a death spiral if the Commission does not take corrective action.

Moreover, the public interest would not be served by a policy of supporting build out of networks that would not be economically sustainable without high cost subsidies. Promotion of competition through subsidization of new entrants

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11 Ad Hoc addresses in section D below whether any of the three measures proposed by the Joint Board to shield incumbent carriers from the effect of limiting high cost support to primary lines is consistent with the principle of competitive neutrality or otherwise consistent with the public interest.

12 NASUCA, Comments at 23-27.

13 *Id.* at 23.

for competition's sake makes no sense. If the price for telecommunications is X dollars per month and a new market entrant cannot provide the service for less than X plus Y dollars per month, obviously subsidizing the possible competitor would be economically inefficient, and a waste of USF money. Conversely, if a new market entrant can provide the service for less than X dollars per month, the new entrant would seem to have a basis for providing the service without the prospect for USF subsidies. A decision to construct a network and to compete for business should not turn on the whether the network will be subsidized through the USF.

C. Limiting High Cost Support To Primary Lines Would Be Consistent With Achieving and Maintaining Reasonable Rate Comparability.

Carriers who enjoy substantial high cost subsidies, of course, oppose limiting high cost support to primary lines.[14] They urge the Commission to limit high cost support through prescription of tougher eligibility standards.[15] BellSouth contends that, "[i]f support were limited to primary lines, carriers would have to charge higher rates for second lines to cover their costs due to the loss of universal service support. These second lines would become too expensive for consumers in high-cost areas."[16] BellSouth goes on to argue,

> If a carrier is unable to receive support beyond a single line, the incentive to deploy adequate facilities to meet demand is significantly reduced. In order to recover its costs, that carrier would have to charge

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[14] *See e.g.,* BellSouth, Comments at 8-11; CenturyTel, Comments at 15-23; Rural Telecommunications Associations, Comments at 16-29.

[15] *See e.g.,* BellSouth, Comments at 3-7; CenturyTel, Comments at 7-15; Rural Telecommunications Associations, Comments at 29-40.

[16] BellSouth, Comments at 8.

> higher rates for non-primary line service – rates that would not be affordable to the public.[17]

The Rural Telecommunications Associations declares that if high cost support is limited to primary lines, rural ILECs will no longer be able to provide their customers with services and rates that are comparable to the services and rates available in urban areas.[18]

The foregoing contentions are entirely conclusory and hyperbolic. These carriers have produced not a shred of evidence that they could no longer provide secondary lines to their customers at affordable, reasonably comparable rates.[19] NASUCA, on the other hand, observes at pages 17 – 18 of its comments that "it is very likely that the cost of subsequent non-primary connections by either type of provider [wireline and wireless] is much lower than the initial connection," and that "[s]econd lines provided by a single firm to a single household or business also tend to be more profitable than the initial line." NASUCA thus believes that "second lines may be provided at an affordable price in rural areas even without support."[20]

Ad Hoc is persuaded by the logic of NASUCA's arguments. NASUCA is right that in most cases wireline facilities are installed to provide at least two

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17 *Id.* at 9.

18 Rural Telecommunications Associations, Comments at 21.

19 The Commission has determined that rates in rural high cost areas served by non-rural carriers will be presumed to be reasonably comparable if such rates are within two standard deviations of the national average urban rate. *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, FCC 03-249 (released October 27, 2003) at ¶ 38. Ad Hoc is not aware of the Commission establishing a similar standard for carriers serving rural areas.

20 NASUCA, Comments at 18.

connections for every customer.[21] Although NASUCA has not provided data to support its views, those views are far more reasonable than the exaggerated, doomsday claims of carriers who are drawing high cost subsidies. If they no longer receive subsidies for secondary lines, they will have a choice. Since virtually all are subject to the jurisdiction of state regulatory authorities, they can seek acquiescence from those authorities for rate increases for secondary lines or they can conclude that they would prefer not to confront a serious review of the cost of providing secondary lines.

Given the enormous pressures on the USF, the Commission should not continue to authorize high cost support for secondary lines unless there is compelling cost justification. If individual carriers can prove that their *costs* prevent them from offering secondary lines at reasonably comparable rates, high cost support might be justified. Even if individual carriers could make such showings (which Ad Hoc doubts they can), the Commission still is responsible, as noted above, for making difficult judgments on the extent to which it can subsidize secondary lines and still assure a specific, predictable and sufficient universal service support mechanism. Indiscriminate subsidization of secondary lines no longer is consistent with the Commission's universal service responsibilities.

Although some members of Congress now contend that the Joint Board's primary line recommendation would be inconsistent with the spirit and purpose of Section 254 of the Act and would reduce incentives for deployment and upgrade

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[21] NASUCA, Comments at 18 n.37.

of facilities in high cost areas, such statements are not reliable indications of Congressional intent.[22] The law is very clear that after-the-fact views from selected elected representatives do not establish the Congressional intent behind legislative provisions.[23] Indeed, many members of the Senate and the House of Representatives may hold views different than the minority of members who have written to the Commission's Chairman expressing such views. The correspondence cited should be seen for what it is, an attempt to pressure the Commission to decide the matter in favor of rural telephone companies that serve areas represented by those elected officials. Of course, there is nothing wrong with elected officials trying to advance the interests of their constituencies. The Commission, however, has a broader responsibility. In this case, it must balance the various goals of the Act in a manner that best serves the public interest.

D. Mitigation Measures Should Be Temporary Pending A More Fundamental Review Of High Cost Support.

AT&T and NASUCA explain that one of the problems facing the Commission is how to adjust the total level of high cost support that would flow to rural carriers if high cost subsidies would only be used to support primary lines.[24] Both favor the Joint Board's proposal to cap per-line support to rural carriers.[25] Ad Hoc however, shares the view of the Rural Cellular Association and the Alliance of Rural CMRS Carriers that the Joint Board's three proposals to

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[22] *See* Rural Telecommunications Associations, Comments at 19.

[23] *See United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 348-49 (1963).

[24] AT&T, Comments at 18-23; NASUCA, Comments at 28-32.

[25] AT&T, Comments at 24; NASUCA, Comments at 32.

mitigate or shield rural wireline carriers from any consequential revenue impact as a result of limiting high cost subsidy support to primary lines would violate the principle of competitive neutrality.[26] Each of the three proposals in different ways and to different degrees would protect wireline carriers' revenues. In effect, landline carriers would receive greater subsidies than they would if the high cost support for which they would be eligible were limited to the embedded costs associated with primary lines. The Joint Board, however, does not appear similarly concerned about the impact on wireless carriers resulting from adoption of a primary line limitation.

If high cost primary line subsidies would be sufficient to maintain the availability of primary lines at affordable and reasonably comparable rates, the Commission should only be concerned about maintaining rural landline carrier revenues when such carriers make showings that their financial integrity would be threatened. Far more than speculation and conclusory assertions are needed to establish a credible threat to the financial integrity of the rural local exchange carriers ("LECs").[27] Wireline carrier interests and their supporters, however, have provided nothing more than speculation and conclusory assertions. Before the Commission continues throwing high cost subsidy money at rural LECs while compromising it's commitment to competitive neutrality, reasoned decision-making requires a rational determination that rural LECs need the revenue flows

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[26] Rural Cellular Association and the Alliance of Rural CMRS Carriers, Comments at 25-26.

[27] *See, Alenco,* 201 F.3d at 624, citing, *inter alia*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, 312 (1989) and *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 128 n.5 (1985).

that the Joint Board's proposal would produce to maintain their financial integrity or to avoid unacceptable rate shock.

E. Conclusion

In view of the foregoing, Ad Hoc urges the Commission to adopt the Joint Board's recommendation that high cost subsidies be limited to support for primary lines. The Commission, however, should not adopt any measure that would, in effect, provide USF support to rural carriers to make up for high cost subsidies that they would lose as a result of limiting high cost subsidy to primary lines. Only in those instances in which rural carriers provide data demonstrating that they require such support to maintain their financial integrity or reasonably comparable rates, should the Commission consider providing USF support to offset the subsidies that would be lost for secondary lines.

Respectfully submitted,

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